No. 76-191

In the

Supreme Court of the United States

OCTOBER TERM, 1976

SIMON ANSCHUL, Individually and on behalf of all persons similarly situated,

Petitioner,

vs.

SITMAR CRUISES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

BRIEF OF RESPONDENT, SITMAR CRUISES, INC., IN OPPOSITION TO THE PETITION OF SIMON ANSCHUL FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MICHAEL A. SNYDER
Counsel For Respondent,
Sitmar Cruises, Inc.

Of Counsel:
BRADLEY, EATON, JACKMAN & MCGOVERN
135 South LaSalle Street
Chicago, Illinois 60603

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STATUTORY PROVISIONS

Rule 19(1)(b) Supreme Court Rules.

"Rule 19. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be

granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) . . .

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Rule 23 Federal Rules of Civil Procedure.

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

ARGUMENT

I.

THE SUPREME COURT SHOULD NOT GRANT CERTIORARI WITH REFERENCE TO THE FIRST QUESTION PRESENTED BY PETITIONER, BECAUSE PETITIONER DID NOT RAISE THE ISSUE IN PROCEEDINGS BELOW.

Petitioner, Simon Anschul, presented the following issues on appeal to the United States Court of Appeals For The Seventh Circuit:

"(a) Does this Court have Jurisdiction to consider this Appeal under 28 USC 1291.

(1) Is a denial of a class action determination appealable as a matter of right.

(b) Do the pleadings on file in this case sufficiently set forth the necessary basis for a plaintiff class under Rule 23.

(1) Is a notice on behalf of a class effective to toll a contractual period of limitation."

In the Court of Appeals, Petitioner argued that the District Court's order denying class action status was appealable as a "collateral order" as that doctrine evolved out of the Supreme Court's decisions in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L. Ed. 1528 (1949) and *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 at 172-173, 94 S.Ct. 2140 at 2149-2150, 40 L.Ed. 2d 732 (1974). Petitioner presented no issue, nor did he make any argument, in reliance upon the "death knell" theory except to say in his reply brief (page 2):

"Further, absent the vehicle of a class action undoubtedly the costs of this litigation would exceed the potential individual recovery, *a valid consideration*

on the question of finality under General Motors v. City of New York (Supra)." [Emphasis Ours]

Prior to filing his Petition for a writ of certiorari, Simon Anschul never advanced the "death knell" theory as an independant basis for jurisdiction in the Court of Appeals. He now requests this Court to decide in the abstract that "an order denying class status is appealable under 28 U.S.C. §1291 pursuant to the "death knell" doctrine." Since the "death knell" theory was not raised in either of the Courts below as an independant ground for appellate jurisdiction, Respondent submits that it would be inappropriate for the Supreme Court to grant a writ of certiorari to decide this question.

II.

THE SUPREME COURT SHOULD NOT GRANT CERTIORARI WITH REFERENCE TO THE SECOND QUESTION PRESENTED BY PETITIONER, BECAUSE THE CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI ARE LACKING.

The second question presented by Petitioner is:

> "(2) Whether the order denying class status in this case is appealable under 28 U.S.C. §1291 pursuant to the "collateral order" doctrine."

The decision of the United States Court of Appeals for the Seventh Circuit in this case recognized the validity of the "collateral order" doctrine, but properly distinguished the order of the District Court under review as one not falling within that "small class [of orders] which finally determine claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and to independant of the cause itself to require that appellate consideration be deferred until

the whole case is adjudicated." *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 at 546, 69 S.Ct. 1221 at 1225-1226, 93 L.Ed. 1528 (1949); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 at 172-173, 94 S.Ct. 2140 at 2149-2150. (Petition, pp. 5a-6a)

Supreme Court Rule 19(1)(b) sets forth the considerations governing review on certiorari. None of the stated considerations apply in this case. Petitioner argues that the District Court's order denying class status was a *Cohen/Eisen* "collateral order" contrary to the holding of the Court of Appeals, stating:

> "The trial judge entered an opinion and order denying the class, without hearing. His finding was predicated on the basis that the plaintiffs class notice was not effective to preserve the rights of all passengers. The notice was, however, effective as to the plaintiffs individually. That determination is a final determination of the class claim. The rights of the class, by this ruling, are clearly separate and separable from the individual rights and substantive events to be determined at the trial in this cause." (Petition, p. 6)

By this argument, Petitioner confuses, and would have this Court confuse, a differentiation by the District Court between the rights of four individual plaintiffs from those claimed on behalf of 753 other cruise passengers as "claims of right separable from, and collateral to, rights asserted in the action. . . ." While the claims of right (a standing to sue in this case) of the four individual passengers named in the notice filed with Respondent pursuant of Clause 18(c) of its contract were clearly separable from the claims of a standing to sue advanced on behalf of the 753 passengers who never filed such notice, neither group's claims were "separable from, and collateral to" rights asserted in the action itself.

In *Cohen* v. *Beneficial Indus. Loan Corp.*, supra, this Court stated:

> "We hold this order appealable because it is a final disposition of a claimed right *which is not an ingredient of the cause of action and does not require consideration with it.* . . ." 337 U.S. 541 at 546-547, 69 S.Ct. 1221 at 1226. [Emphasis Ours]

Clearly, the claim advanced by Petitioner on behalf of the 753 passengers, who filed no notice as required by contract, that they, nevertheless, had standing to sue, was a claimed right which was an ingredient of the cause of action and which did require consideration with it.

Petitioner unwittingly acknowledges by his argument that the threshold question of standing to sue is not common to all passengers; nor is this claim of the Petitioner typical of the class. Therefore, the prerequisites of maintaining a class action as set forth in Rule 23(a) (2) and (3) of the Federal Rules of Civil Procedure are not met. Consequently, apart from the fact that both the District Court and the Court of Appeals have thus far ruled correctly, the Petitioner, himself, discloses further reasons why this case is not maintainable as a class action.

CONCLUSION

For the foregoing reasons, Respondent respectfully urges this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

SITMAR CRUISES, INC.,
By its attorney,
MICHAEL A. SNYDER

Of Counsel:
BRADLEY, EATON, JACKMAN & MCGOVERN
135 South LaSalle Street
Chicago, Illinois 60603
(312) 372-3827